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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 JERRY P. DIZON,

12 Plaintiff,

13 v.

14 WELLS FARGO, N.A.,

15 Defendant.  
16

Case No. 12-cv-04623 NC

**REFERRAL FOR REASSIGNMENT  
WITH RECOMMENDATION TO  
DISMISS**

Re: Dkt. No. 6

17 Plaintiff Jerry P. Dizon has a home mortgage loan with defendant Wells Fargo. This  
18 action arises from Dizon's alleged default on and attempt to modify the terms of that  
19 mortgage. The issues are (1) if Dizon has stated a claim for relief under Federal Rules of  
20 Civil Procedure 8 and 9(b), and (2) whether the Home Owner's Loan Act ("HOLA")  
21 preempts Dizon's state law claims. Because all parties have not consented to the  
22 jurisdiction of a United States magistrate judge, this Court lacks the authority to rule on  
23 Wells Fargo's pending motion to dismiss. Accordingly, the Court REFERS the case for  
24 reassignment to a district court judge and RECOMMENDS the motion to dismiss be  
25 GRANTED, with leave to amend.

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Case No. 12-cv-04623 NC  
REFERRAL FOR REASSIGNMENT  
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## I. BACKGROUND

### A. Dizon's Complaint

Dizon took a mortgage on the property located at 3751 Carol Street in Pinole, California from defendant Wells Fargo. Dkt. No. 1, Ex. A ¶ 12. Dizon alleges six causes of action against Wells Fargo: (1) breach of contract, (2) fraud, (3) negligence, (4) intentional tort, (5) failure to modify the loan under the California Foreclosure Prevention Act ("CFPA"), and (6) declaratory and injunctive relief. Specifically, Dizon alleges that Wells Fargo agreed "to make good faith and reasonable efforts" to modify the structure of his mortgage. *Id.* Wells Fargo allegedly misrepresented, however, its authority to modify the loan, with the intent to make Dizon rely on that misrepresentation. *Id.* ¶ 18. Wells Fargo also allegedly concealed from Dizon material facts in order that he would not seek other means of avoiding foreclosure. *Id.* In addition, Dizon alleges that Wells Fargo breached its duty of care to him when it declined to modify his mortgage. *Id.* ¶ 20. Dizon cites to the CFPA and California Civil Code §§ 2923.52 and 2923.53 in support of his claim that Wells Fargo breached its duty of care by denying him a loan modification. *Id.* ¶¶ 25-26. Finally, Dizon seeks declaratory relief that Wells Fargo failed to comply with California Civil Code § 2923.5. *Id.* ¶ 29.

Dizon seeks damages, including punitive damages, declaratory relief, preliminary and permanent injunctions, cancellation of the trustee sale and restitution of his property, costs, and fees. Dkt. No. 1, Ex. A at 26.

### B. Wells Fargo's Motion to Dismiss

Wells Fargo moves to dismiss Dizon's claims on the grounds that Dizon fails to satisfy the pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and that to the extent that Dizon states any claims, HOLLA preempts them. Dkt. No. 6. Dizon does not oppose this motion.

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**C. Wells Fargo's Request for Judicial Notice**

Wells Fargo seeks judicial notice of several facts that Dizon does not mention in his complaint: (1) that Dizon borrowed \$308,000 from Wells Fargo's predecessor World Savings Bank, which was secured by a deed of trust in the property at 3751 Carol Street, Pinole, California; (2) that World Savings Bank changed its name first to Wachovia Mortgage, FSB, then to Wells Fargo Bank Southwest, N.A., before merging with defendant, Wells Fargo Bank, N.A.; (3) that the Office of Thrift Supervision ("OTS"), the regulatory agency created by HOLA, acknowledged the name changes and approved the merger; (4) that Dizon defaulted on his loan in April of 2009; (5) that a notice of default was recorded on March 11, 2011; and (6) that a notice of trustee's sale was recorded on July 20, 2012. Dkt. No. 6 at 1. These facts are contained within Exhibits A-H to Wells Fargo's request for judicial notice. Dkt. No. 7.

Although a district court generally may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion, the Court may take judicial notice of documents referenced in the complaint, as well as matters in the public record, without converting a motion to dismiss into one for summary judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). A matter may be judicially noticed if it is either "generally known within the territorial jurisdiction of the trial court" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1192 n.4 (9th Cir. 2008). In addition, under Federal Rule of Civil Procedure 10(c), a court may take judicial notice of "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). However, the court may not judicially notice the truth of the disputed facts contained in such a document. *Lee*, 250 F.3d at 689.

Here, Wells Fargo seeks judicial notice of documents that are in the public record and subject to verification. The Court RECOMMENDS that the district court take judicial

notice of Exhibits A-H. Because the issue of whether Dizon was notified properly is in dispute, however, the Court RECOMMENDS that the district court take judicial notice of the existence of Exhibit G, the notice of default, but not judicially notice the truth of the facts asserted therein, for example that Wells Fargo used due diligence to contact Dizon.

#### **D. Jurisdiction**

Subject matter jurisdiction exists under 28 U.S.C. § 1332. Wells Fargo filed a notice to remove Dizon's complaint from state to federal court. Dkt. No. 1. Wells Fargo alleges that it is a national bank whose main office, as designated in its articles of association, is located in South Dakota. Dizon resides in California. Because all parties have not consented to the jurisdiction of a magistrate, this court does not have jurisdiction to render a judgment under 28 U.S.C. § 636(c).<sup>1</sup>

## **II. STANDARD OF REVIEW**

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead his claim with sufficient specificity to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citation and internal quotation marks omitted). In accordance with Rule 9(b), allegations of fraud "must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (citation and internal quotation marks omitted). After *Iqbal*, a pleading of fraud or mistake must also plead plausible allegations. *Id.* A court is not required to accept as true conclusory allegations,

<sup>1</sup> The Court ordered the parties to consent or decline to the jurisdiction of the magistrate judge by September 18, 2012. Dizon did not respond. *See* Dkt. No. 8.

1 unreasonable inferences, or unwarranted deductions of fact. *Manzarek v. St. Paul Fire &*  
2 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). If a complaint lacks facial  
3 plausibility, a court must grant leave to amend unless it is clear that the complaint's  
4 deficiencies cannot be cured by amendment. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898  
5 (9th Cir. 2002).

### 6 III. DISCUSSION

7 Wells Fargo challenges the sufficiency of each of the claims in the complaint:  
8 (1) breach of contract, (2) fraud, (3) negligence, (4) intentional tort, (5) failure to modify the  
9 loan under the CFPA, and (6) declaratory and injunctive relief.

#### 10 A. Dizon Fails to Allege a Plausible Claim for Breach of Contract.

11 Wells Fargo moves to dismiss this claim arguing that Dizon fails to state the elements  
12 of a breach of contract in his complaint and, in particular, that he fails to identify the  
13 contract allegedly breached, attach the contract, or plead its material terms. Dkt. No. 6 at  
14 10. Wells Fargo denies that there is a contract to maximize the value of Dizon's mortgage.  
15 *Id.* at 11. Dizon alleges he and Wells Fargo have an implied agreement to "make good faith  
16 and reasonable efforts to maximize the present value of the loan by modifying the  
17 mortgage," to "provid[e] information to fully document the loan and increase said loan  
18 credit or default rating," to disseminate that information with care, and "to act honestly and  
19 truthfully." Dkt. No. 1, Ex. A ¶ 12. Dizon claims that Wells Fargo breached the implied  
20 agreement by failing to provide information about his mortgage, improperly calculating his  
21 income for modification purposes, and delaying the modification process in. *Id.* ¶ 13.

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1 The existence of a contract is an essential element of a breach of contract claim.  
 2 Under California law, the existence and terms of an implied contract are manifested by  
 3 conduct. Cal. Civ. Code § 1621. Dizon fails to allege any facts that show conduct on his  
 4 part or the part of Wells Fargo that would manifest the intent to enter into an implied  
 5 contract. Because Dizon has not adequately pleaded a plausible claim for breach of  
 6 contract, the Court RECOMMENDS that this claim should be DISMISSED WITH LEAVE  
 7 TO AMEND.<sup>2</sup>

8 **B. Dizon Fails to Plead with Specificity a Plausible Claim for Fraud.**

9 In his second cause of action, Dizon alleges that Wells Fargo lacked the authority to  
 10 modify his loan, but nevertheless represented to him that it could, with the intent to make  
 11 him rely on that misrepresentation. Dkt. No. 1, Ex. A ¶ 18. Dizon also alleges that Wells  
 12 Fargo concealed from him material facts so that he would not seek other means of avoiding  
 13 foreclosure. *Id.* In his fourth cause of action—intentional tort—Dizon restates these facts.  
 14 *Id.* ¶ 22. Therefore, the Court considers these claims together.

15 Dizon’s fraud claim against Wells Fargo contradicts his earlier claim for breach of  
 16 contract, in which he alleged that Wells Fargo had a contractual obligation to modify the  
 17 loan. Beyond that inconsistency, Dizon fails to plead with specificity the elements of a  
 18 fraud claim under Rule 9(b), which requires stating “with particularity the circumstances  
 19 constituting fraud.” Fed. R. Civ. P. 9(b). In other words, a plausible claim of fraud states  
 20 “the who, what, when, where, and how,” plus “what is false or misleading about the . . .  
 21 statement, and why it is false.” *Cafasso*, 637 F.3d at 1055. Dizon does not state who made  
 22 the representation, or what exactly was said, or why it is false. Accordingly, the Court  
 23 RECOMMENDS that Dizon’s fraud claim be DISMISSED WITH LEAVE TO AMEND.  
 24

25 <sup>2</sup> Wells Fargo asserts that HOLA preempts all of Dizon’s claims. Dkt. No. 6 at 18. Although  
 26 HOLA’s regulation of lending may be extensive, there is nothing to suggest that it preempts every  
 27 state law that touches upon lending. HOLA expressly does not preempt state contract law or state  
 28 tort law with only an incidental effect on lending operations. 12 C.F.R. § 560.2(c); *Bank of  
 America v. City & Cnty. of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002). Thus, for those  
 claims which Dizon has leave to amend, a preemption analysis is premature at this juncture.

**C. Wells Fargo Does Not Have a Duty to Modify Dizon's Loan.**

Dizon alleges that Wells Fargo breached its duty to modify the loan and is therefore liable for negligence. Although couched in its own claim, Dizon relies on the CFPA to argue that lenders have an obligation to modify loans. Because the CFPA operates as the standard of care for Dizon's negligence claim, the Court considers these claims as one.

The provisions of the CFPA that Dizon cites are no longer in effect. Cal. Civ. Code §§ 2923.52-.53. They have been repealed as of January 1, 2011. *Id.* The corresponding statute currently in effect, California Civil Code § 2923.6, does not impose any affirmative obligation on lenders to modify mortgages. *Mabry v. Superior Court*, 110 Cal. Rptr. 3d 201, 211 (Cal. Ct. App. 2010), *review denied* (Aug. 18, 2010). "Section 2923.6 merely expresses the hope that lenders will offer loan modifications on certain terms"; it does not create rights or obligations. *Id.* Furthermore, under California law, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Ragland v. U.S. Bank, N.A.*, 147 Cal. Rptr. 3d 41, 62 (Cal. Ct. App. 2012). Dizon does not assert any facts to suggest that his relationship with Wells Fargo goes beyond that of lender and borrower. In the absence of a duty to modify Dizon's loan, or to act according to a particular standard of care, Dizon cannot state a claim for negligence. Accordingly, the Court RECOMMENDS that Dizon's negligence claim be DISMISSED WITHOUT LEAVE TO AMEND.

**D. Dizon Fails to Allege Facts That State a Claim Under Civil Code § 2923.5 and He Is Ineligible for the Relief Contemplated by That Statute.**

Finally, Dizon seeks a declaration of the invalidity and unenforceability of the trustee's sale because Wells Fargo failed to comply with California Civil Code § 2923.5. Dkt. No. 1, Ex. A ¶ 29. Section 2923.5 requires lenders to contact the borrowers thirty days before filing the notice of default. Cal. Civ. Code § 2923.5(a)(1). Other than stating the conclusion that "the trustee's sale was improperly noticed," Dizon fails to state any facts indicating that Wells Fargo did not comply with § 2923.5. Furthermore, the only remedy



1 available under § 2923.5 is postponement of the foreclosure sale until the lender complies.  
 2 *Mabry*, 110 Cal. Rptr. 3d at 204. Because Dizon's home has already been sold, there is no  
 3 remedy for him under § 2923.5. Therefore, even if Dizon could state a plausible claim, the  
 4 declaratory relief which he seeks would amount to an impermissible advisory opinion. *See*  
 5 *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 n.20 (1983) ("[A] court must have the power  
 6 to fashion some appropriate remedy. This concern, an aspect of the more general case or  
 7 controversy requirement, reflects the view that the adjudication of rights which a court is  
 8 powerless to enforce is tantamount to an advisory opinion."). The Court therefore  
 9 RECOMMENDS the district court GRANT WITHOUT LEAVE TO AMEND Wells  
 10 Fargo's motion to dismiss this claim.

#### 11 IV. COUNSEL'S LACK OF DILIGENCE

12 Dizon is represented by attorney Mandip Purewal of the National Consumer Law  
 13 Group. Yet Dizon's counsel filed no pleadings in this Court once the case was removed  
 14 from state court. Counsel filed neither an opposition nor a statement of nonopposition to  
 15 the motion to dismiss, in violation of Civil Local Rule 7-3(b). Furthermore, while  
 16 researching for this opinion, the Court discovered that Purewal copied and pasted into this  
 17 complaint and another action he has pending in San Francisco Superior Court, *see Kwon v.*  
 18 *JP Morgan Chase Bank*, CGC-12-524388 (Sept. 18, 2012), nearly the entirety of a  
 19 complaint filed by another attorney in other foreclosure cases, *see, e.g., Mira v. GMAC*  
 20 *Mortg.*, 10-cv-03394 RS, 2010 WL 4010148 (N.D. Cal. Oct. 13, 2010); *Mazzamuto v.*  
 21 *Wachovia*, 10-cv-02851 WHA, 2010 WL 4916430 (N.D. Cal. Nov. 23, 2010). The Court is  
 22 concerned by the apparent lack of diligence by Purewal. Accordingly, by December 10,  
 23 2012, Purewal must provide a copy of this Order to Dizon and e-file a declaration stating  
 24 that he has complied with this Order. Also, Purewal should take note that Judge Alsup  
 25 ordered the attorney whose work Purewal copied to pay personally an award of attorneys'  
 26 fees because of his pattern of misconduct. *Mazzamuto*, 2010 WL 4916430, \*3. Purewal  
 27 must find a better example to follow.

28 //



**V. CONCLUSION**

Dizon fails to allege sufficient facts to state a plausible claim for breach of contract. In addition, he fails to state with specificity the elements of a fraud claim. Because not all parties have consented to magistrate jurisdiction, the Court RECOMMENDS that Dizon's claims for (1) breach of contract and (2) fraud be DISMISSED WITH LEAVE TO AMEND. No statutory or common law duty exists between Wells Fargo and Dizon to modify his mortgage, and therefore Dizon's claim of negligence fails. Dizon's claim for declaratory relief fails to satisfy the pleading requirements and calls for an improper advisory opinion. Intentional tort is not a cause of action, and the substance of this claim will be addressed by Dizon's fraud claim, if he chooses to amend it. Therefore, this Court RECOMMENDS that claims (3), (4), (5), and (6) be DISMISSED WITHOUT LEAVE TO AMEND. Any party may object within fourteen days to this dispositive order under Federal Rule of Civil Procedure 72(b).

IT IS SO ORDERED.

Date: November 26, 2012

  
Nathanael M. Cousins  
United States Magistrate Judge